No. 2903

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN GILL, for whom has been substituted Maurice McMicken, Administrator with the will annexed of John Gill, Deceased,

Plaintiff in Error,

vs.

FRANK WATERHOUSE,

Defendant in Error

SUPPLEMENTAL REPLY BRIEF OF DEFENDANT IN ERROR.

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The motion for nonsuit in the Court below was based upon four grounds:

(1) Failure of the plaintiff in error to prove that the bank had signified to the defendant in error its acceptance of his offered letter of guaranty within a reasonable time;

(2) That the debt owing to the bank by the English corporation had been paid;

(3) That the debt of the bank against the English corporation was barred by the statute of limitations, and as the guaranty of the defendant in error is a collateral security for that debt, no right of action on the guaranty can be maintained after the right of action of the creditor against the principal debtor had become barred; and,

(4) There was no proper proof offered of the indebtedness of the English corporation to the bank.

In the original brief filed by the plaintiff in error herein, he discussed only the first two of these propositions; but his reply brief, recently filed since the argument by permission of the Court, contains a discussion and citation of authorities upon the two last propositions and some new contentions as to the other propositions. As we have heretofore had no opportunity to reply to the arguments and authorities thus presented by the plaintiff in error in this reply brief, we are venturing to ask the Court to permit us to file this supplemental brief.

I

NOTICE OF ACCEPTANCE OF GUARANTY

Plaintiff in error concedes that notice of acceptance must ordinarily be seasonably given to the

guarantor, in order to complete the contract, but insists that this is not required "in respect to guaranties which in terms are absolute and unconditional." This contention is fully met by *Davis Sew. Mch. Co. v. Richards,* 115 U. S. 524. In that case, as in the case at bar, the guaranty was absolute and unconditional; in that case, as in the case at bar, the person guaranteed did, in fact, accept the guaranty and extended the credit contemplated to the debtor; in that case, the first notice given to the guarantor that his guaranty was accepted was given three years later, when demand of payment was made of the guarantor, while in the case at bar the guaranty was executed in 1899, and the first notice given to defendant that his guaranty had been accepted by the bank was in October, 1906, when demand of payment was made. In that case the Supreme Court held, as did the trial court in the case at bar, that the guarantor could not be held on the guaranty because not seasonably notified of its acceptance.

Plaintiff in error refers to the sixth affirmative defense, without, however, pointing out its relevancy to this proposition. The defense avers acceptance of the guaranty in connection with other guaranties, but it does not show that the defendant was seasonably notified of the acceptance by the bank.

II

PAYMENT

This question was discussed by plaintiff in error in his original brief and by us in our answering brief. We do not intend to enter into a new discussion of this subject, but wish to call the attention of the Court to the quotations made by plaintiff in error, on page 7 of his brief, from the testimony of the witness Gill. The quotation begins in the middle of a sentence with the following words: "the Bank were desirous that the debt, etc." What the witness really said was as follows, the part omitted by plaintiff in error being in italics:

> *"I have no direct personal knowledge of the initiation of the transaction between the late John Gill and the Commercial Bank of Scotland, Ltd., but my understanding is* that the bank were desirous that the debt due by Frank Waterhouse, Ltd., should be repaid and that Mr. Alexander McNab, who was one of the guarantors and who was not, *I understand,* in a position to meet the guarantee if it were enforced against him, approached the late John Gill as a friend and asked him to take over the debt; that the late John Gill agreed to do so, and paid off the debt, *which amounted to £22,897:16:5,* and obtained the assignation *before mentioned by the Commercial Bank of Scotland, Ltd., in favor of himself as an individual,* in consideration of said payment by him to the bank, *and that the payment was made by cheque or cheques by the late John Gill. I have not been able to find the cheque or cheques among the late John Gill's papers."*

Manifestly, the statement of this witness cannot be taken as evidence of any agreement on the part of Gill and the Bank that the payment made by Gill to the Bank should be considered as a purchase and not a payment of the debt. In the first place, the witness distinctly states that he has no personal knowledge of the matter whatever, and what he states is merely his understanding of the transaction obtained from other sources without personal knowledge. Furthermore, while he states that it was the understanding that McNab asked Gill "to take over the debt," he further states that Gill "paid off the debt." The phrase "take over the debt" is certainly no more significant than the phrase "paid off the debt," particularly in view of the further statement of his understanding that the Bank had demanded payment of the debt, and of the fact that the Bank's books entered the payment as a payment of the debt, not a purchase, and that no assignment of the debt was ever made by the Bank.

Reference is also made in this connection to the testimony of Anderson, on page 32 of the Record. Witness Anderson, as shown in our answering brief, stated that he had no connection with this transaction, nor any personal knowledge thereof. His testimony upon that point was, therefore, excluded by the Court below.

Plaintiff in error also claims that the execution of the assignment of the guaranty in suit, although made eight months after the payment, is evidence of an agreement made at the time of the payment that the assignment would subsequently be executed. When all of the circumstances are considered, we think the inference is quite otherwise. Plaintiff says:

> "If the transaction was a purchase, the guaranties followed the debt and the mere delivery was sufficient to authorize the holder to sue thereon in the Courts of Great Britain."

If the debt had been purchased and assigned by the Bank to Gill, it may be that the guaranties would follow as an incident of the principal thing, the debt, and it may be that under the English law the assignee of the debt would be entitled to sue on the guaranties in his own name; but in this case the debt was never assigned. The assignment was of one of the six letters of guaranty. Therefore, Gill was never in a position to demand of or sue the English corporation upon the debt. He could not sue in his own name because the debt was not assigned to him. He could not sue in the name of the Bank because the assignment in evidence expressly provides:

> "PROVIDED ALWAYS that it shall not be competent to the said John Gill or his foresaids to use our name or instance in any action or steps of procedure to follow hereon."
>
> (Record, p. 92).

The failure to assign the debt, and the express provision that Gill should not use the name of the Bank in any suit or action is very persuasive, if not conclusive, evidence that it was not the intention of the Bank to clothe Gill with any rights whatever with respect to the debt of the English corporation to the Bank. If Gill paid the debt, at the instance and for the benefit of McNab, one of the co-guarantors, we can readily understand why Gill and McNab might subsequently request the Bank to assign the guaranty of the defendant in order to aid McNab, or Gill as his representative, in recovery by way of contribution from the defendant as a co-guarantor. The assignment of the guaranty under those conditions would be intelligible and consistent with the rights of the parties. The assignment of the guaranty, however, without the debt, and the insertion of the clause in the assignment that the name of the Bank should not be used in any proceedings brought by the assignee, thereby making it impossible for the assignee to sue for the recovery of the principal debt, is entirely inconsistent with the theory that Gill purchased and intended to become the owner of the debt. If there is any inference to be drawn from the execution of this assignment in the form in which we find it, that inference is that the payment by Gill was intended to extinguish the debt of the Bank, and the assignment of the guaranty subsequently was intended to aid

him as the representative of the other guarantors in enforcing contribution against this defendant as a co-guarantor. The present action, however, is not a suit for contribution.

III

RELEASE OF PRINCIPAL DEBTOR RELEASES GUARANTOR

1. The record shows that the creditor bank and the principal debtor, the English corporation, were both corporations organized and located in England. The debt was evidenced by an open account, and more than four years elapsed between the date of the last item on the account and the commencement of the action in this case. The right of action of the Bank against the principal debtor on this account was barred by the three-year statute of limitations, cited in our original brief, if the law of the forum applies. If the law of England is, or is presumed to be, the same as the law of the forum so far as it affects the remedy, then the right of action as against the principal debtor was barred in England, and by §178 R. & B. Code of Washington, it was barred here.

The fifth affirmtaive defense of the defendant set up the defense that the right of action of the creditor against the principal debtor being barred, no action could be maintained against this defendant, the guarantor. The law of England, where the creditor and

principal debtor resided, was neither alleged nor proven by either party in this case. The theory of the defendant in error is that in the absence of any evidence as to the law of a foreign country, the rule established by the state courts must be followed by the Federal courts as to the statute of limitations and other matters relating to the remedy; and that the rule of decision established in the state courts of Washington is that the Court will presume that the foreign law is the same as that of the forum; while the contention of the plaintiff in error, as advanced in its reply brief, is that it devolved upon the defendant to plead and prove the foreign law. (Reply Brief, p. 13).

The rule is well settled in the State of Washington that in an action in its courts based upon a cause of action arising in a foreign country, or where the rights of the parties depend upon the law of a foreign country, and there is no proof of such foreign laws, the Court will determine the cause according to the laws of the State of Washington, it being presumed in the absence of any pleading or evidence to the contrary that foreign laws are the same as the laws of the forum.

Pitt v. Little, 58 Wash. 355,
Gunderson v. Gunderson, 25 Wash. 459.

This presumption prevails in the State of Wash-

ington with respect to both the common law and the statutory law of the foreign country and it has become a settled rule of decision in that state. It is further the rule in that state that if either party is relying upon the laws of a foreign country and those laws are claimed to be different from the laws of the State of Washington, then the party asserting such rights under the foreign law must plead or prove the foreign law.

(Same authorities).

In Jones on Evidence, Section 84, the general rule is stated as follows:

> "Wharton says that with regard to what may be called processual presumption, of which the presumption that a foreign law is the same as the domestic is one, no doubt the *lex fori* decides. (Citing Wharton on Conflict of Laws, §782). But it amounts to the same thing whether you say that, in the absence of proof, the Court will presume the foreign law to be like the domestic law, or that the Court will proceed according to the domestic law. It must always be remembered that the courts do not take judicial notice of foreign laws, no matter whether they be written or unwritten. They must be proved like any other fact. The general rule is that in order to obtain the benefit of the law of a foreign country, it must be pleaded and proved. And in the absence of proof to the contrary, the rights of the parties will be adjudicated by the law of the forum. Where the rights of litigants are to be determined in this country, although those rights might be affected by proof of the law of a *foreign* country where the contract was made or the right

accrued, in the absence of any such proof the law of the forum must furnish the rule of decision."

The presumption that the foreign law is the same as the law of the forum is, of course, a presumption of fact and is a rule of evidence. Under Sections 721 and 914 U. S. Rev. Stat., this rule of decision or rule of evidence established by the state courts controls in a Federal court sitting in the State of Washington, in so far as it relates to the statutes of limitations or otherwise relates to the remedy.

Nashua Svgs. Bank v. Anglo-American Land Co., 189 U. S. 221. This case is illuminating. In order to establish its case, the plaintiff was required to prove certain statutes of England, and the trial court admitted the deposition of an English solicitor in proof of the statutes. The objection was made that, under *Church v. Hubbert,* 2 Cranch 187, 238, the statutes could be proved in the Federal Courts only by production of duly exemplified copies. The Court said, in disposing of this objection, that the state courts of New Hampshire permitted proof of foreign statutes by witnesses acquainted with them producing copies without exemplifications, and that "the circuit court of the United States sitting in New Hampshire may, under Revised Statutes, Sec. 721, declaring that 'the laws of the several states,' with certain exceptions, 'shall be regarded as rules of decision in trials at common law in the courts of the United States,' receive such evidence

of the authentication of foreign statutes as the practice of the courts in that state may authorize and justify. *McNeil v. Holbrook,* 12 Pat., 89; *Conn. Mut. L. Ins. Co. v. Union Tr. Co.,* 112 U. S. 255; *Vance v. Campbell,* 1 Black 427. The laws of the several states with respect to evidence within the meaning of this section apply, not only to the statutes, but to the decisions of their highest courts."

In *McNeil v. Holbrook, supra,* the Court held that a Federal Court sitting in Georgia was bound by a state statute declaring, as a rule of evidence, that in actions by an assignor or indorser of a bill or note, the assignment or indorsement, without regard to its form, should be sufficient evidence of the transfer and of the genuineness of the handwriting.

In *Sims v. Hundley,* 6 How. (N. S.) 1, a notary's certificate, while inadmissible under the principles of general law, was competent evidence in a Federal Court sitting in Mississippi, whose statute made it competent evidence of certain facts.

And in *Bucher v. Railroad Company,* 125 U. S. 555, the Court says:

> "It is also well settled that where a course of decisions, whether founded upon statutes or not, have become rules of property as laid down by the highest courts of the state, by which is meant those rules governing the descent, transfer or sale of property, and the rules which affect the title

and possession thereto, they are to be treated as laws of that state by the Federal courts.

"The principle also applies to the rules of evidence."

In *Union Pac. R. Co. v. Botsford,* 141 U. S. 250, the Court held that the Federal Courts in the state in which there was no statute and no practice with respect to the matter, had no authority to require the plaintiff to submit to a physical examination by the experts of the defendant. But in *Camden v. Stetson,* 177 U. S. 172, the Court held that where there was a state statute authorizing the Court to require the plaintiff to submit to such physical examination, the Federal Court sitting in that state was clothed with the powers conferred by that statute, it relating to rules of evidence.

We submit, therefore, that these cases establish, (1) that by the established rule of decision or rule of evidence of the state courts the law of a foreign country, in the absence of any other evidence, is presumed in fact to be the same as the law of the state: (2) that this rule of the state courts controls the Federal Courts sitting in this state, under the provisions of §§721 and 914 Revised Statutes, where the question involves the remedy and procedure, and not matters of substantial rights.

The State Courts held, in substance, that a cause of action accruing in a foreign country will be pre-

sumed to be barred by the lapse of the period of time which would bar it if it had accrued in this state, in the absence of proof of a different period of prescription in the foreign country. If this rule was embodied in a state statute, Federal Courts sitting in this state, would follow the statute, under Section 721 U. S. Rev. St. In the Nashua Savings Bank case, supra, the Court held that the term "laws" as used in Section 721 applied to state decisions as well as to state statutes, with respect to evidence, and it would seem to logically follow that evidentiary presumptions with respect to matters controlled by the law of the forum, such as limitations of action, when they become established by the decisions of the state courts, become a part of the laws of the state, and as such control all actions brought in the state. The proposition might be stated in a different form. By the statutes of Washington open accounts are barred in three years, and by Section 178, R. & B. Code, debts barred in a foreign country are barred when sued on here. By the decisions of the Supreme Court of Washington, an open account between residents of a foreign country, and outstanding for more than three years, will be presumed to be barred by these statutes and no recovery will be permitted thereon in our courts unless the party seeking such recovery shows affirmatively some fact removing or preventing the bar. That fact may be a provision of the foreign law, or some act of the

debtor, but in either case, the fact relied upon must be proven—otherwise a recovery will be denied by virtue of Section 178 R. & B. Code.

Now, this course of decisions in the state courts, construing and applying these statutes and establishing a rule of evidence in their application, is controlling upon the Federal Courts sitting in this state and administering these same statutes, under Sections 721 and 914 Rev. Statutes.

The cases cited by Plaintiff in error did not involve matters affecting the remedy, nor was there any rule of evidence established in the state courts either by state statute or local decisions. Whether a liability, once existing, is still subsisting and enforceable, notwithstanding the lapse of time, is a question of local law relating to the remedy.

Under the doctrine in the Prescott case the plaintiff seeking to recover on a collateral undertaking was required to prove,

(a) The collateral undertaking of defendant; and,

(b) An *existing* liability of the principal debtor at the time the action was commenced. Having failed to prove an existing liability of the principal debtor at the time the action was commenced, the action fails.

2. Plaintiff in error, however, contends that even assuming the correctness of our position on this point, the rule does not prevent the maintenance of this action against the defendant in error on a guaranty, and he seeks to distinguish the case of *Spokane County v. Prescott,* 19 Wash. 418, and other cases cited by us, claiming that the doctrine of these cases applies only to a surety on a statutory bond. This is, manifestly, erroneous. The principle announced by the Court in those cases is that where the undertaking of the surety is *collateral security* for the performance of the principal obligation by the principal debtor, no action can be maintained on the collateral security after the bar of the statute as to the principal obligation. The Court instances, as an illustration of the application of the rule, the case of a mortgage, which is collateral security for the debt; an illustration of its application totally inconsistent with the contention that it applies to sureties on statutory bonds only.

In the case of *Lindblom v. Johnson,* 158 Pac 972 (Wash.), the Court, referring to the Prescott case and explaining the principle upon which it was based, said:

> "It was sought to hold the sureties on the theory that their promise to answer for the defalcation was in writing, and that liability thereon existed for six years, which time had not then expired. The judgment was rested on the ground that there could be no recovery against the sureties unless liabilty existed against the principal

> at the time of the commencement of the action; this on the principle that their *undertaking was collateral* to his, and their liability ceased when his ceased." (Italics ours).

In other words, the principle announced by the Court in these cases is that where the obligation sued on is a collateral undertaking, and the debt had been barred as to the principal debtor, no action can be maintained upon the collateral undertaking against the persons collaterally liable. It is immaterial whether this collateral undertaking is in the form of a statutory bond executed by sureties or in the form of a mortgage as collateral security for the debt, or in the form of a guaranty of the obligation of another. The test is, was the undertaking collateral? The use of the word "surety" in this connection is somewhat confusing. Ordinarily, a surety's obligation is not collateral, but he is chargeable as an original promisor with the principal, while the guaranty is always a collateral undertaking.

> "The vital difference between the contract of a surety and that of a guarantor is that a surety is charged as an original promisor, while the engagement of the guarantor is a collateral undertaking. A surety is a party to the principal obligation, undertaking, together with the principal debtor, that it shall be performed, while the guarantor is not a party to the principal obligation. In case of suretyship, there is but one contract binding the surety and the promisor, but in the case of a guaranty there are two contracts, one binding the principal debtor and one binding the

> guarantor. A creditor may bring an action jointly against a surety and the debtor, but he cannot join both the guarantor and the debtor in one suit. The agreement of the surety is that he will do the thing which the principal has undertaken. The agreement of the guarantor is that the principal will do what he is bound to perform."
>
> 12 *Ruling Case Law,* p. 1057.
> *Brandt on Suretyship and Guaranty,* §1.

Sometimes, however, the obligation of a surety is not direct and joint with the promisor, but is collateral, and such is the case of a surety on a bond.

In *Welch v. Walsh,* 59 N. E. 440, this distinction is pointed out:

> "The difference between the contract of a guarantor and the contract usually entered into by a surety is that in case of a guarantor the promise of the person secondarily liable is a collateral promise to pay in case default is made by one who is primarily liable for the thing guaranteed, while a surety contracts directly as a principal to pay the sum of money for which he is secondarily liable. See *Bigelow, J., in Allen v. Herrick,* 15 Gray 274, 285. So far as this difference is concerned, the contract of the surety upon a bond conditioned for the payment of sums collected by a third person partakes of the nature of the contract of a guarantor, and not of the contract of a surety."

In each of the cases decided by the Washington Court, as well as in the other cases cited in our original brief on this question, the test applied is whether the undertaking sued on was a collateral undertaking or a direct obligation.

In the case of *State v. Blake,* 2 Ohio State 147, cited, the Court specifically stated that the bond was a collateral security and "that the collateral obligation can exist no longer than the liability it was created to secure."

Also, in *Couch v. Waring,* 9 Conn. 261, it was stated that:

> "Whatever, therefore, amounts to a good defense to the original liability of the principal, is a good defense for the sureties when sued upon the collateral undertaking."

In none of these cases was there any intimation that the principle applied only to actions upon statutory bonds.

There is a conflict in the decisions of the various state courts upon this question, and plaintiff in error, in his brief, has cited a large number of cases holding the contrary doctrine. Many of these cases refer to the case of *State v. Blake,* and to cases in this state and in California, but none of them, so far as we have been able to examine them, distinguish these cases upon the ground that they applied only to sureties upon official or statutory bonds. On the contrary, they recognize the doctrine of the cases as being applicable to guarantors.

In *Seabury v. Sibley,* 66 N. E. 603, in an action against a guarantor, the Massachusetts Court recog-

nizes the Ohio case and the case of *Bridges v. Blake,* 106 Ind. 332, as being applicable to actions against guarantors, but holds that those cases are against the weight of authority, and refuses to follow them.

We, of course, are not now concerned with the question of the weight of authority, or even of the correctness of the principle of the Prescott case. It is the established law of the State of Washington, and, of course, is controlling in the case at bar.

Plaintiff in error cites a large number of cases on pages 14 and 15 of his reply brief to the effect that the rule we contend for is not applicable to voluntary commercial guaranties of payment. Whether a surety who is an original promisor is released from his obligation when the bar of the statute has run against the principal debtor, is a question upon which there is a conflict of decision. In California, as shown by the cases cited by plaintiff in error, it is held that a surety who is an original promisor with the principal, is not released by the running of the statute against the principal; whereas, in the case of *County of Sonoma v. Hall,* 62 Pac 257, the same Court held that a surety on a bond, that being a collateral undertaking, was released when the statute ran against the principal debtor. The same rulings were made in Kansas and Ohio, as shown by the cases cited by plaintiff in error, it being

held that sureties who were original promisors were not released by the bar of the debt against the principal, but that sureties who were only collaterally liable were released when the principal debtor was released by limitation. These cases are not contrary to our contention, but are entirely consistent with it.

Plaintiff in error contends that the obligation of an absolute guarantor is the same as that of a surety. While the obligation is in many respects similar to those of a surety, it is not accurate to say that they are the same. One is a direct and the other a collateral undertaking. The guarantor is a surety in the sense that his liability is secondary, and he is consequently entitled to the rights resulting therefrom. It was in this sense that it was spoken of as the obligation of a surety in *Davis v. Wells.* In *Douglass v. Reynolds,* 7 Peters, 113, 127, the Court said that "by the general principles of law, the guarantors are only collaterally liable upon the failure of the principal debtor to pay the debt. A demand upon him and a failure on his part to perform his engagements are indispensable to constitute a *casus foederis.*"

IV

PROOF OF DEBT

The Court below excluded both of the accounts offered by the plaintiff in error, showing the in-

debtedness from the English corporation to the Bank, upon objections made by the defendant that the indebtedness was not properly proven. In the reply brief, plaintiff in error cites as proof of the indebtedness the following evidence:

(a) Statement by Lang (Record p. 43), as follows:

> "The sums advanced by the Commercial Bank of Scotland, Ltd., were advanced against cheques drawn by Frank Waterhouse, Ltd., upon the Commercial Bank of Scotland, Ltd."

Manifestly, this is no proof of any item in the account. The witness Lang was an accountant in the Bank, and did not have or profess to have any personal knowledge of the advances represented by these various accounts. The only information he had was the appearance of the accounts on the books of the Bank. The statement that the sums advanced were advanced against checks drawn by the English corporation does not in any manner tend to prove what sums were in fact advanced.

(b) Responding to our criticism to the effect that the checks were not produced at the trial or before the Commissioner taking the depositions in this case, plaintiff in error states that the checks drawn on the Loan Account accompanied one of the suppressed depositions. No such fact appears in the record; and if the plaintiff was in possession

of these checks at the time of the trial and failed to introduce them, he manifestly can claim no benefit therefrom.

(c) Statement of McEwen, on page 36 of the Record, to the effect that he had in his possession the checks drawn upon the General Account and Number 2 Account, but could not part with them, and that he had compared them with one of the accounts offered in evidence and that they agreed with the figures stated in that account. These checks had no reference to the principal or loan account constituting the major part of the indebtedness, and which was incurred before McEwen became connected with the English corporation. The most that can be inferred from McEwen's statement is that he has certain checks in his possession which agree with the debit items of the two smaller accounts; he does not claim to have any knowledge of the transactions beyond the fact of the possession of the checks.

There were three accounts known on the books, respectively, as the "Loan Account," "Number 2 Account," and "General or Current Account." The checks mentioned by McEwen as being in his possession were, according to his statement, the checks drawn on the Number 2 Account and the General or Current Account, attached to the deposition of

Coutts (Record, p. 36). This account referred to by McEwen was offered in evidence as Plaintiff's Exhibit "E" (Record, p. 40) and excluded on objection of defendant. The Number 2 Account, referred to by McEwen in this connection, being Plaintiff's Exhibit "E," is found on pages 109-110 of the Record. The General or Current Account referred to by him is found on the lower half of Record, page 113. There are two debit items on the Number 2 Account (Plaintiff's Exhibit "E"), one being a charge of £5,000 under date of June 20, 1898, and a charge of £400 under date of August 12, 1898.

McEwen did not become connected with the English corporation until August, 1898. This debit item of £5,000, under date of June 20, 1898, was a charge made prior to the time he became connected with the company, and he does not claim to have had any knowledge concerning it except that at the time his deposition was taken he had a check in his possession corresponding with that item.

The debit charge of £400, under date of August 12, 1898, is shown by the account to have been immediately repaid, apparently on the same day, as the next item on the account is a credit item for the same amount. All other debit items on this Account Number 2 are mere charges of interest which, of course, do not represent any checks. There are two

other debit charges on the Account Number 2, found on Record p. 110, under date of September 28 and October 30. It is impossible, however, to determine from the account itself whether these debits represent cash advances, interest charges or debits of some other nature. It is thus manifest that, so far as this Account Number 2 is concerned, McEwen held only one check in his possession, and that is for a charge made before he became connected with the debtor corporation.

Turning to the General or Current Account of Exhibit "E," found on Record p. 113, we find that the first item of the account is a credit of £700 under date of May 6, 1901, which is offset by the debit charge under date of March 1, 1902, for £700. The other items on the account are merely interest charges, and the account itself is balanced under date of May 5, 1903.

There is another and different statement of the account of the Bank found in the record, being Plaintiff's Exhibit "D," (Record, p. 94), which is the account about which the witness Lang testified. The account referred to by witness McEwen, however, and with the items of which he claims to have compared the checks in his possession, was an account attached to Coutts' deposition and which is Plaintiff's Exhibit "E." From the analysis given above, it is plain, therefore, that the only debit charge on the

accounts referred to by McEwen which could have been represented by any check in his possession was the single item of June 20, 1898, about which the witness does not claim to have had any personal knowledge whatsoever. The plaintiff did not offer in evidence these two accounts, that is, the General Account and Number 2 Account, separated and severed from the Loan Account. The debit item of £5,000, which, as we have shown above, is the only debit charge on these two accounts which we can infer was represented by any check, is dated June 20, 1898, and was, of course, barred by the statute of limitations. Under the decisions of the State of Washington, as cited in our original brief, the subsequent credit entries on the account and the debit entries of interest charges thereon made by the Bank, did not stop the running of the statute of limitations.

In any view that can be taken of the matter there was no error in the ruling of the Court excluding the account known as Plaintiff's Exhibit "E."

(d) The statement of Lang (Record p. 42), to the effect that he had examined the accounts and that they are copies of the accounts taken from the books of the Bank. Manifestly, this statement is not proper evidence of the indebtedness represented by the accounts. It might be accepted as proof that

the copies of the accounts tendered in evidence were copies taken from the books of the Bank, but it has no tendency whatever to prove the indebtedness itself. It has never been held by any Court, so far as our researches have gone, that a copy of an account on the creditor's books is of itself proof of the indebtedness against the debtor. The authorities are cited in our original brief.

Other questions discussed in the reply brief are considered by us in our original brief.

Respectfully submitted,

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Attorneys for Defendant.